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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Fathers & Daughters Nevada, LLC, a
Nevada Limited Liability Company,

Case No. 2:16-cv-00406-NVW

Plaintiff,

**MOTION FOR LEAVE TO TAKE
DISCOVERY PRIOR TO RULE 26(f)
CONFERENCE**

John and Jane Doe 1-33.

Defendants.

1. INTRODUCTION

This action seeks to address the infringement of Plaintiff's copyrighted movie entitled "Fathers & Daughters." Fathers & Daughters was released in the United States on October 1, 2015. The film is directed by Gabriele Muccino and stars Russell Crowe, Amanda Seyfried and Kylie Rogers. In the movie, Russell Crowe's character is a Pulitzer-winning writer struggling with being a widower and father after a mental breakdown. 27 years later, his grown daughter struggles to forge connections of her own.

Illegally downloading mainstream movies to avoid purchasing a ticket, the DVD or a rental fee is so pervasive that the public widely accepts it without question. There are even websites devoted to illegal copying. One such website is The Pirate Bay where instructions on how to download the required pirating software, usually a torrent, may be obtained. The Pirate Bay even provides a convenient “Pirate Search” tab that enables

1 copiers to “shop” for illegal copies of games, music, movies, books and software. This
2 illegal copying, which clearly is an intentional act since it requires an infringer to install
3 special software and search out movies to pirate, is the problem this lawsuit addresses.

4 Cloaked in the anonymity of the Internet, digital pirates banded together into
5 swarms using file-sharing technology such as BitTorrent to illegally obtain and distribute
6 high quality copies of the Fathers & Daughters. While each single act of infringement
7 may appear to be slight, collectively, illegal downloading often starts even before a movie
8 is released and costs legitimate industries millions of dollars.

9 Thus, this suit not only represents a single copyright owner faced with the daunting
10 task of protecting its intellectual property from the irreparable harm caused by over one-
11 hundred-thousand swarming infringers, it is emblematic of the fight of the motion picture
12 industry and any other legitimate businesses that rely on copyright protection. Plaintiff
13 sued each Defendant as a “Doe” because Defendants committed infringement using on-
14 line pseudonyms (“user names” or “network names”), not their true names. Plaintiff has
15 only been able to identify the Doe Defendants by (1) their Internet Protocol (“IP”)
16 addresses, (2) the dates and times of the infringement, (3) the hash value which identifies
17 each Defendant as cooperatively participating in the same swarm and (4) the location of
18 each IP address.

19 Defendants’ actual names may only be obtained from the non-party Internet
20 Service Providers (“ISPs”) to which Defendants subscribe and from which Defendants
21 obtain Internet access, as this information is readily available to the ISPs from documents
22 kept in the regular course of business. Accordingly, Plaintiff seeks leave of Court to serve
23 limited discovery prior to a Rule 26(f) conference on the non-party ISPs solely to
24 determine the true identities of the Doe Defendants. Plaintiff requests that the Court allow
25 Plaintiff to serve Rule 45 subpoenas on the ISPs immediately and that the ISPs shall
26 comply with the subpoenas.

27 If the Court grants this Motion, Plaintiff will serve subpoenas on the ISPs
28 requesting the identifying information. The ISPs will be able to notify their subscribers

1 that this information is being sought, and, if so notified, each Defendant will have the
2 opportunity to raise any objections before this Court. Thus, to the extent that any
3 Defendant wishes to object, he or she will be able to do so.¹

4 **II. ARGUMENT**

5 Pursuant to Rule 26(d)(1), except for circumstances not applicable here, absent a
6 court order, a party may not propound discovery in advance of a Rule 26(f) conference.
7 Rule 26(b) provides courts with the authority to issue such an order: “[f]or good cause, the
8 court may order discovery of any matter relevant to the subject matter involved in the
9 action.” *Turner Industries Group, LLC vs. International Union of Operating Engineers,*
10 *Local 450*, U.S. Dist. LEXIS 68746, at *7-*10 (S. D. Tex. 2013). In Internet infringement
11 cases, courts routinely find good cause exists to issue a Rule 45 subpoena to discover a
12 Doe defendant’s identity, prior to a Rule 26(f) conference, where: (1) plaintiff makes a
13 prima facie showing of a claim of copyright infringement, (2) plaintiff submits a specific
14 discovery request, (3) there is an absence of alternative means to obtain the subpoenaed
15 information, (4) there is a central need for the subpoenaed information, and (5) defendants
16 have a minimal expectation of privacy. *See Arista Records, LLC v. Doe* 3, 604 F.3d 110
17 (2d Cir. 2010) (citing *Sony Music Entm’t v. Does* 1-40, 326 F.Supp.2d 556, 564-65
18 (S.D.N.Y. 2004) (numbers added)); *Elektra Entm’t Group, Inc. v. Doe*, No. 5:08-CV-115-
19 FL, 2008 WL 5111886, at *4 (E.D.N.C. Dec. 4, 2008) (same); *Warner Bros. Records, Inc.*
20 *v. Doe*, No. 5:08-CV-116-FL, 2008 WL 5111883, at *4 (E.D.N.C. Dec 4, 2008) (same);
21 *BMG Music v. Doe # 4*, No. 1:08-CV-135, 2009 WL 2244108, at *3 (M.D.N.C. July 24,
22 2009) (same); *see also Arista Records LLC v. Does 1-19*, 551 F.Supp.2d 1, 6-7 (D.D.C.
23 2008), and the cases cited therein, noting the “overwhelming” number of cases where
24 copyright infringement plaintiffs sought to identify “Doe” defendants and courts
25 “routinely applied” the good cause standard to permit discovery. Here, all of the good
26 cause elements are present. Thus, this Court should grant the Motion.

27 ¹ Although not binding on this Court, on March 11, 2016, in a similar case filed by a
plaintiff PTG Nevada, LLC to enforce its copyright interests in another motion picture,
United States Magistrate Judge Michelle H. Burns granted Plaintiff’s Motion to Take
Discovery Prior to Rule 26(f) Conference. A copy of the Court’s order is attached as
Exhibit 1 for the Court’s reference.

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3 **A. Precedent Allowing Discovery to Identify Doe Defendants.**

4 In copyright cases brought by motion picture studios and record companies against
5 Doe defendants, courts routinely grant leave to take expedited discovery to serve
6 subpoenas on ISPs to obtain the identities of Doe Defendants prior to a Rule 26
7 conference. *TCYK, LLC v Does 1-9*, 13-cv-14322 (E.D. Mich. December 2, 2013)(Doc.
8 9); *Patrick Collins Inc. v John Does 1-21*, 282 F.R.D. 161, 2012 WL 1198040 (E.D. Mich.
9 2012); *Warner Bros. Records, Inc. v. Does 1-6*, 527 F.Supp.2d 1, 2 (D.D.C. 2007)
10 (allowing plaintiffs to serve a Rule 45 subpoena upon Georgetown University to obtain
11 the true identity of each Doe defendant, including each defendant's true name, current and
12 permanent addresses and telephone numbers, email address, and Media Access Control
13 ("MAC") address) (*citing* Memorandum Opinion and Order, *UMG Recordings, Inc. v.*
14 *Does 1-199*, No. 04-093(CKK) (D.D.C. March 10, 2004); Order, *UMG Recordings v.*
15 *Does 1-4*, 64 Fed. R. Serv. 3d (Callaghan) 305 (N.D. Cal. March 6, 2006)).

16 The following factors are considered when granting motions for expedited
17 discovery to identify anonymous Internet users: (1) whether the plaintiff can identify the
18 missing party with sufficient specificity such that the Court can determine that defendant
19 is a real person or entity who could be sued in federal court; (2) all previous steps taken by
20 the plaintiff to identify the Doe Defendant; and (3) whether the plaintiff's suit could
21 withstand a motion to dismiss. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-
22 80 (N.D. Cal. 1999).

23

24 **B. Good Cause Exists to Grant the Motion.**

25

1. **Plaintiff's Prima Facie Claim for Copyright Infringement.**

26

a. *Overview of Allegations and Factual Showings.*

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28

The Complaint alleges that the Doe Defendants, without authorization, used an online media distribution system to cooperatively download the copyrighted Fathers & Daughters and to cooperatively distribute it to other users on the P2P network, including

1 by making the copyrighted Fathers & Daughters for which Plaintiff holds the exclusive
2 reproduction and distribution rights. (Compl. ¶¶ 11-18.)

3 Maverickeye UG (“MEU”), a provider of online anti-piracy services for the movie
4 industry, was engaged to monitor this infringing activity. (Exhibit 2, Declaration of Daniel
5 Macek (“Macek Decl.”).) An IP address is a unique numerical identifier that is
6 automatically assigned to an Internet user by the user’s Internet Service Provider (“ISP”).
7 In logs kept in the ordinary course of business, ISPs keep track of the IP addresses
8 assigned to their subscribers. Once provided with an IP address, plus the date and time of
9 the detected and documented infringing activity, ISPs can use their subscriber logs to
10 identify the name, address, email address, phone number and Media Access Control
11 number of the user/subscriber. (Macek Decl. ¶ 17.)

12 Only the ISP to whom a particular IP address has been assigned for use by its
13 subscribers can correlate that IP address to a particular subscriber. From time to time, a
14 subscriber of Internet services may be assigned different IP addresses from their ISP.
15 Thus, to correlate a subscriber with an IP address, the ISP also needs to know when the IP
16 address was being used. Unfortunately, many ISPs only retain for a very limited amount
17 of time the information necessary to correlate an IP address to a particular subscriber.
18 (Macek Decl. ¶ 18.)

19 To identify the IP addresses of those BitTorrent users who were copying and
20 distributing Plaintiff’s copyrighted Fathers & Daughters, Daniel Macek, a software
21 consultant with MEU, was responsible for analyzing, reviewing and attesting to the results
22 of the investigation. (Macek Decl. ¶¶ 19-22.)

23 Forensic software provided by MEU to scan peer-to-peer networks for the presence
24 of infringing transactions (Macek Decl. ¶ 23) and the IP addresses of the users responsible
25 for copying and distributing Fathers & Daughters were isolated. (Macek Decl. ¶ 24.)
26 Through each of the transactions, the computers using the IP addresses identified in
27 Complaint Exhibit A transmitted a copy or a part of a copy of a digital media file
28 identified by the relevant hash value. The IP addresses, hash values, dates and times

1 contained in Complaint Exhibit A correctly reflect what is contained in the evidence logs.
2 The subscribers using the IP addresses set forth in Complaint Exhibit A were all part of a
3 “swarm” of users that were reproducing, distributing, displaying or performing the
4 copyrighted work. (Macek Decl. ¶ 25.)

5 Moreover, the users were sharing the exact same copy of the Fathers & Daughters.
6 Any digital copy of an audiovisual work may be uniquely identified by a unique, coded,
7 string of characters called a “hash checksum.” The hash checksum is a string of
8 alphanumeric characters generated by a mathematical algorithm known as US Secure
9 Hash Algorithm 1 or “SHA-1”, which was developed by the National Security Agency
10 and published as a US government standard. Using a hash tag to identify different copies
11 of the Fathers & Daughters, it was confirmed that these users reproduced the very same
12 copy of the Fathers & Daughters. (Macek Decl. ¶26.)

13 The MEU software analyzed each BitTorrent “piece” distributed by each IP
14 address listed in Complaint Exhibit A and verified that reassembling the pieces using a
15 specialized BitTorrent client results in a fully playable digital copy of the Fathers &
16 Daughters. (Macek Decl. ¶27.)

17 The software uses a geolocation functionality to confirm that all IP addresses of the
18 users set forth in Complaint Exhibit A are accurate. Though an IP address alone does not
19 reveal the name or contact information of the account holder, it does reveal the locations
20 of the Internet line used for the transaction. IP addresses are distributed to ISPs by public,
21 nonprofit organizations called Regional Internet Registries. These registries assign blocks
22 of IP addresses to ISPs by geographic region. In the United States, these blocks are
23 assigned and tracked by the American Registry of Internet Numbers. Master tables
24 correlating the IP addresses with local regions are maintained by these organizations in a
25 publicly-available and searchable format. An IP address’ geographic location can be
26 further narrowed by cross-referencing this information with secondary sources such as
27 data contributed to commercial database by ISPs. (Macek Decl. ¶ 28.)

28

b. Plaintiff's Showing Of Copyright Infringement.

Plaintiff has sufficiently identified the Doe Defendants through the unique IP address that each Doe Defendant was assigned at the time of the unauthorized distribution and copying of the copyrighted Fathers & Daughters. These Defendants gained access to the Internet through their respective ISPs by setting up an account with the various ISPs. The ISPs can identify each Defendant by name through the IP address by reviewing its subscriber activity logs. Thus, Plaintiff can show that all Defendants are “real persons” whose names are known to the ISP and who can be sued in federal court.

A *prima facie* claim of copyright infringement consists of two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Plaintiff satisfied the first good cause factor by properly pleading a cause of action for copyright infringement. (Compl. at ¶¶ 11-18) *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004) (“Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright.”); *Elektra Entm't Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111886, at *4 (E.D.N.C. Dec. 4, 2008) (“[P]laintiffs have established a *prima facie* claim for copyright infringement, as they have sufficiently alleged both ownership of a valid copyright and encroachment upon at least one of the exclusive rights afforded by the copyright.”); *Warner Bros. Records, Inc. v. Doe*, No. 5:08-CV-116-FL, 2008 WL 5111883, at *4 (E.D.N.C. Dec 4, 2008) (same). Accordingly, Plaintiff has exceeded its obligation to plead a *prima facie* case.

2. Plaintiff Seeks Limited And Specific Discovery.

Plaintiff only seeks to discover the name and address of the Defendants. This is all specific information that is in the possession of the Defendant's ISP that will enable Plaintiff to advance the action. Since the requested discovery is limited and specific, Plaintiff has satisfied the second good cause factor.

3. No Alternative Means Exist to Obtain Defendant's True Identities.

Other than receiving the information from the Defendants' ISP, there is no way to obtain Defendants' true identity because the ISP is the only party who possesses records which track IP address assignment to their subscribers. Consequently, the ISP is the source for information relating to associating an IP address to a real person. Since there is no other way for Plaintiff to obtain Defendant's identity, except by serving a subpoena on Defendant's ISPs demanding it, Plaintiff has established the third good cause factor. See *Columbia Ins. Co. v. Seescandy et al.*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999); *Elektra Entm't Group, Inc. v. Doe*, No. 5:08-CV-115-FL, 2008 WL 5111886, at *4 (E.D.N.C. Dec. 4, 2008) (finding that the feasibility of a suggested alternative method of determining defendants' identities by hiring a private investigator to observe downloading "is questionable at best"); *Warner Bros. Records, Inc. v. Doe*, No. 5:08- CV-116-FL, 2008 WL 5111883, at *4 (E.D.N.C. Dec 4, 2008) (same).

4. Discovery Is Needed to Advance the Asserted Claims.

Plaintiff will not be able to serve the Defendants with process and proceed with this case without the requested discovery. Plaintiff's statutorily protected property rights are at issue in this suit and, therefore, the equities should weigh heavily in favor of preserving Plaintiff's rights. Since identifying the Defendant by name is necessary for Plaintiff to advance the asserted claims, Plaintiff has established the fourth good cause factor. *Sony*, 326 F.Supp. at 566; *BMG Music v. Doe # 4*, No. 1:08-CV-135, 2009 WL 2244108, at *3 (M.D.N.C. July 24, 2009) (finding under nearly identical circumstances that "[p]laintiffs have shown that the subpoenaed information—Doe # 4's identity—is centrally needed to advance Plaintiffs' copyright infringement claim").

5. Plaintiff's Interest in Knowing Defendant's True Identities Outweighs Defendant's Interests in Remaining Anonymous.

Plaintiff has a strong legitimate interest in protecting its copyright. Defendants are copyright infringers with no legitimate expectation of privacy in the subscriber information provided to the ISP, much less in distributing the copyrighted work in

1 question without permission. *See Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001)
2 (“computer users do not have a legitimate expectation of privacy in their subscriber
3 information because they have conveyed it to another person—the system operator”);
4 *BMG Music v. Doe # 4*, No. 1:08-CV-135, 2009 WL 2244108, at *3 (M.D.N.C. July 24,
5 2009) (finding under nearly identical circumstances that “[p]laintiffs have shown that
6 Defendant Doe # 4 has a minimal expectation of privacy downloading and distributing
7 copyrighted songs without permission”); *Interscope Records v. Does 1-14*, 558 F.Supp.2d
8 1176, 1178 (D. Kan. 2008) (a person using the Internet to distribute or download
9 copyrighted music without authorization is not entitled to have their identity protected
10 from disclosure under the First Amendment); *Sony*, 326 F.Supp.2d at 566 (“defendants
11 have little expectation of privacy in downloading and distributing copyrighted songs
12 without permission”); *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8-9 (D.D.C.
13 Apr. 28, 2008) (finding that the “speech” at issue was that doe defendant’s alleged
14 infringement of copyrights and that “courts have routinely held that a defendant’s First
15 Amendment privacy interests are exceedingly small where the ‘speech’ is the alleged
16 infringement of copyrights”); *Sony Music Entm’t, Inc. v. Does 1-40*, 326 F. Supp. 2d 556,
17 566 (S.D.N.Y. 2004) (“defendants have little expectation of privacy in downloading and
18 distributing copyrighted songs without permission”); *Arista Records, LLC v. Doe No. 1*,
19 254 F.R.D. 480, 481 (E.D.N.C. 2008); *U.S. v. Hambrick*, 55 F. Supp. 2d 504, 508 (W.D.
20 Va. 1999), aff’d, 225 F.3d 656 (4th Cir. 2000).

21 Downloading a mainstream motion picture is no different than downloading a
22 song. Being named as a defendant in this action does not expose an individual to
23 embarrassment. It is not blackmail. In fact, copying music and mainstream movies is so
24 pervasive that the public widely accepts it without question. And, this is the exact problem
25 this lawsuit addresses: That copying a mainstream movie is no different than downloading
26 a song. This issue raises no privacy concerns.

27
28

1 **C. Irreparable Harm Establishes Good Cause to Grant the Motion**

2 Good cause exists here for the additional reason that a claim for copyright
3 infringement presumes irreparable harm to the copyright owner. This is especially true in
4 this matter since the copying results in financial losses such as lost ticket sales and
5 eroding rentals and purchases. *See UMG Recordings, Inc. v. Doe*, 2008 WL 4104214
6 (N.D. Cal. 2008) (finding good cause for expedited discovery exists in Internet
7 infringement cases, where a plaintiff makes a prima facie showing of infringement, there
8 is no other way to identify the Doe defendant, and there is a risk an ISP will destroy its
9 logs prior to the conference); Melville B. Nimmer & David Nimmer, NIMMER ON
10 COPYRIGHT, § 14.06[A], at 14-03 (2003); *Elvis Presley Enter., Inc. v. Passport Video*, 349
11 F.3d 622, 631 (9th Cir. 2003).

12 The first and necessary step that Plaintiff must take to stop the infringement of its
13 valuable copyright is to identify the Doe Defendants who are copying and distributing the
14 Fathers & Daughters. This lawsuit cannot proceed without the limited discovery Plaintiff
15 seeks because the ISPs are the only entities that can identify the otherwise anonymous
16 Defendants. Courts regularly permit early discovery where such discovery will
17 “substantially contribute to moving th[e] case forward.” *Semitool*, 208 F.R.D. at 277.

18 **III. CONCLUSION**

19 For the foregoing reasons, Plaintiff respectfully submits that the Court should grant
20 the pending Motion for Leave to Take Discovery Prior to the Rule 26 Conference.
21 Plaintiff requests permission to serve a Rule 45 subpoena on the ISPs it has identified as
22 of this date, and those it identifies in the future, so that the ISPs can divulge the true name
23 and address of each Doe Defendant that Plaintiff has identified to date, and those it
24 identifies in the future during the course of this litigation and an order that the ISPs shall
25 comply with the subpoenas. Plaintiff will only use this information to prosecute its claims.
26 Without this information, Plaintiff cannot pursue its lawsuit to protect Fathers &
27 Daughters from past and ongoing, repeated infringement.

1 RESPECTFULLY SUBMITTED this 23rd day of March, 2016.

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